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**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT, JEREMY DAVIS, CHRISTOPHER CASTILLO, and MONIQUE TRUJILLO individually and on behalf of all similarly situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' OPPOSITION TO GOOGLE'S MOTION TO STRIKE (DKT. 733)**

The Honorable Susan van Keulen

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## I. INTRODUCTION

There is no basis for Google's motion to strike or to claw back this redacted document. *See* Dkt. 671-11 (Ex. 6 to Plaintiffs' August 8 motion), labeled GOOG-BRWN-00857642 (the "Document"). As part of the Court-ordered privilege re-review, after initially withholding the Document in its entirety, Google revisited that determination and in July produced the Document with redactions. That redacted version is what Plaintiffs (and Google) properly cited in various filings, and there is no basis to now strike anything.

The redacted Document includes emails among Google employees without any attorneys responding, including Bert Leung, Chris Liao, and Martin Sramek. Google attorneys put eyes on this short document ***at least four times***, including with three court filings (two belonging to Google). Each time, Google attorneys concluded (correctly) that at least the unredacted portions of the Document are not privileged. Google did not claim otherwise until after Plaintiffs explained the Document's import to their request for supplemental sanctions. Only then did Google initiate a clawback request and file this motion to strike portions of Plaintiffs' filings.

Google's motion should be denied for two reasons. *First*, Google waived any protection by failing to timely object to the use of the redacted Document in numerous prior court filings, including Google filings. *Second*, Google failed to comply with this Court's Local Rules. Google should have filed an objection to reply evidence within seven days of Plaintiffs filing their sanctions reply. Civil L.R. 7-3(d)(1). Google missed that deadline, and should not be permitted to disguise this untimely objection as a separate motion to strike.

For the reasons stated below, Plaintiffs also respectfully request that the Court order *in camera* review of the entire Document, including the redacted portions. *In camera* review is appropriate because the entirety of the Document is unlikely to be protected, particularly because (1) Google attorneys apparently agree that at least portions are not privileged (as noted above), and (2) no attorney wrote any of the emails with the Document.

## II. BACKGROUND

### A. Google Produced this Redacted Document Based on Court-Ordered Re-Review.

On February 23, 2022, Google served its fourth privilege log, containing a single entry for the Document, withholding the Document in its entirety and without providing separate entries for each communication in the Document. Mao Decl. Ex. 1 (Entry 7517). On July 21, 2022, in response to the Court's order regarding Google's re-review of documents withheld as privileged, Google produced the Document with redactions. Mao Decl. ¶ 3. The Document is short—five pages—and includes emails to key people in this case, including Bert Leung, Chris Liao, and Martin Sramek. Mot. at 5. The unredacted portion that Google produced to Plaintiffs is even smaller—approximately one page—including an email from Mr. Leung.[1]

### B. Google Reviewed the Document Five Times Without Clawing It Back.

Between July and August 2022, Google attorneys reviewed the Document ***at least five times***, including with three filings, two ***filed by Google***. Each time, Google attorneys concluded that at least portions of the Document (the previously unredacted portions) are ***not*** privileged.

1. July 21, 2022: Google produces the Document, with heavy redactions, pursuant to its Court-ordered re-review of documents from privilege logs. Dkt. 733-1 ¶ 5. During the re-review process, Google attorneys ***decided to de-privilege*** and produce portions of this Document, which Google previously withheld in its entirety.
2. August 3, 2022: Plaintiffs send Google an email identifying examples of recently produced documents that Google de-privileged where Plaintiffs have been prejudiced by the belated production, ***including the Document***. Mao Decl. ¶ 4.
3. August 8, 2022: Plaintiffs file their motion seeking relief for Google's belated production of documents improperly withheld as privileged (Dkt. 672), ***quoting the Document on the first page of their motion***. Plaintiffs also attach the Document to their motion (Dkt. 671-11), and Plaintiffs quote the Document in the Exhibit A chart accompanying their motion (Dkt. 671-3).
4. August 16, 2022: ***Google files*** its opposition to Plaintiffs' motion, where ***Google twice discusses the Document***. Dkt. 692 at 3 & n.2, 5 & n.6. Google addresses the substance of the Document, suggesting that it "reflect[s] information contained in earlier-produced documents on which Plaintiffs have taken substantial discovery." *Id.* at 5.
5. August 16, 2022: ***Google files*** a motion to strike the Exhibit A chart attached to Plaintiffs' August 8 motion (but not seeking to strike the Document itself, nor the

[1] Plaintiffs already isolated the Document and are unable to access it. Mao Decl. ¶ 6. Plaintiffs complied with the clawback request and wrote this brief without re-reviewing the Document. *Id.*

portion of the underlying motion that quoted the Document). Dkt. 693. Google's motion to strike ***also discusses the Document***. *Id.* at 2 & n.1.

At no point in connection with any of these filings and communications did Google ever claim that the redacted portions of the Document are privileged, nor did Google at any point seek to claw back any portion of the Document. As noted, Google even filed a motion to strike that did not raise the privilege claim underlying this (subsequent) motion to strike.

**C. Google's Untimely Clawback Demand.**

Google waited until August 26 to issue its clawback demand, doing so only after Plaintiffs discussed the Document in their reply in support of their supplemental sanctions motion (Dkt. 708 at 1-2; 707-3). This marked the sixth time (at least) that Google attorneys reviewed the Document. Did it actually take sophisticated counsel six times to discover that a single-page email thread was privileged? Maybe. After all, "six times was a charm" for legendary attorney Vincent Gambini.[2] More likely, Google decided to claw back the redacted Document only after Plaintiffs, in their sanctions reply, explained the Document's import to [redacted]

**D. Google Refuses to Meaningfully Meet-and-Confer.**

Although Google's clawback request is meritless, Plaintiffs promptly (over that weekend) provided their position and sought to meet-and-confer to minimize the burden on this Court. Mao Decl. ¶ 5. Google did not cooperate. After a meet and confer on August 29, Plaintiffs proposed that Google submit the Document for *in camera* review, and promised that Plaintiffs would revise any filing that referred to portions of the Document the Court found to be privileged. Mao Decl. ¶ 7. To facilitate that process, Plaintiffs asked that Google provide a privilege log entry for each individual email within the Document. *Id.* Plaintiffs also asked Google to provide additional information about the nature of the communications, and Plaintiffs promised not to use Google's provision of additional information as a basis for arguing that Google waived any privilege. *Id.*

[2] *My Cousin Vinny* (1992).

Plaintiffs sent this proposal on August 30, but Google did not respond until 10:30 p.m. PT on September 2, and Google minutes later filed this motion to strike. *Id.*

## III. ARGUMENT

### A. Google Waived any Privilege Over the Unredacted Portions of the Document.

Even if the unredacted portions of the Document were protected by attorney-client privilege and/or work product (they aren't, as explained below), Google waived any protection by voluntarily producing those portions after a re-review, and then responding to arguments and discussing those unredacted portions of the Document in multiple filings. Because Google waived any protections over the unredacted portions of the Document that it produced, which is all that Plaintiffs have cited, there is no basis for the Court to strike anything. Google's waiver alone necessitates denial of Google's motion to strike in its entirety.

Google waived any privilege by failing to "promptly t[ake] reasonable steps to rectify the [purported] error." Fed. R. Evid. 502. Google has been on notice of this Document since at least July 21, 2022, when Google made the conscious decision to produce a redacted version of it. Google suggests that it took "swift action" to claw back the Document (Mot. at 2), but in fact Google waited over month. During that time, Google attorneys reviewed the unredacted portions of the Document at least four times, including with (A) Plaintiffs' August 3 meet-and-confer email, (B) Plaintiffs' August 8 motion, and (C) and ***two filings that Google prepared***, where Google discussed the Document, including portions Google now claims to be privileged. *See supra* Section II.A. Google at no point objected to the parties' repeated references to the Document.

*AdTrader, Inc. v. Google LLC*, 405 F. Supp. 3d 862, 864 (N.D. Cal. 2019) is instructive. *AdTrader* likewise involved a dispute over a document that Google attempted to claw back as privileged, which the plaintiff had also quoted in a court filing. The court reasoned that the plaintiff's filing "should have put Google on notice to at least inquire promptly about whether such a reference, in fact, reflected advice of counsel." *Id.* at 866. Because "Google did not act promptly to investigate and remedy its inadvertent disclosure of privileged information in the [] email after that email was brought to its attention, . . . Google has waived the attorney-client privilege with

respect to the disputed material in the [] email." *Id.*; *see also Holley v. Gilead Scis., Inc.*, 2021 WL 2371890, at *5 (N.D. Cal. June 10, 2021) (finding waiver where plaintiffs "quoted directly from a portion of the [document the defendant] later claimed is privileged" and defendant delayed in seeking to claw back the document). Waiver is even more warranted here because Google itself ***twice*** discussed the Document in ***its own*** court filings, including portions Google claims to be privileged. Google never sought to revise those pleadings or the discussion therein.

Google appears to argue that the ESI Order somehow supplants Federal Rule of Evidence 502(b) and relieves Google of its obligation to promptly rectify any inadvertent disclosures. Mot. at 7. That argument fails for two reasons. *First*, while "Rule 502 allows parties to modify individualized protective orders, unless those modifications contain 'concrete directives' regarding each prong of Rule 502(b), the prongs of Rule 502(b) remain the standard for evaluating a claw back request." *United States v. United Health Grp., Inc.*, 2020 WL 10731257, at *3 (C.D. Cal. Nov. 9, 2020). "Parties must adequately articulate their desire to supplant the Rule 502 analysis in an agreement under 502 (d) or (e)." *Id.* Here, as in *United Health*, "[t]here is no express statement in the Protective Order demonstrating that the parties intended Rule 502 should not apply." *Id.* Google does not argue otherwise, nor could Google. All the ESI Order provides is that "the mere production of privileged or work-product protected documents . . . is not itself a waiver." Dkt. 80 at 5. "Accordingly, the [Court] will follow the established prongs of Rule 502(b) to determine whether waiver occurred." *Id.* Google's reliance on *Great-West Life & Annuity Ins. Co. v. American Economy Insurance Co.*, 2013 WL 5332410, at *14 (D. Nev. Sept. 23, 2013) is misplaced. In that case, the ESI agreement "clearly provides that inadvertently produced documents, upon a determination that the documents are privileged, must be returned without waiver to the disclosing party *regardless of the care taken by the disclosing party*." *Id.* (emphasis added). There is no corresponding agreement in this case.

*Second*, even if the ESI Order explicitly supplanted Rule 502(b) (it does not), that would not help Google overcome waiver in this scenario, where waiver is based on Google's failure to object to the Document's use (as opposed to a mere delay in discovering the inadvertent

disclosure). "Claw–back provisions . . . govern only waivers by inadvertent disclosure. They are intended to override the common law as to inadvertent disclosure, not displace the entire common law concerning privilege. Thus, other common-law waiver doctrines may result in a finding of waiver." *Hologram USA, Inc. v. Pulse Evolution Corp.*, 2016 WL 3654285, at *2 (D. Nev. July 5, 2016) (cleaned up). "Accordingly, failure to timely object to the introduction of an exhibit waives any privilege, regardless of the presence of a claw-back provision governing inadvertent disclosure." *Id.* (citing cases). That is precisely the problem for Google here: Google failed to timely object to Plaintiffs' reliance on the redacted Document, including in Plaintiffs' August 8 motion, where Plaintiff quoted from the redacted Document and attached it to their filing. Worse, Google subsequently addressed the redacted Document in two of its own filings, including the exact portion that Plaintiffs quoted. Whether the ESI agreement permits "a longer period for clawing back" the Document (Mot. at 7) is beside the point and does not excuse Google's conduct.

*Luna Gaming-San Diego, LLC v. Dorsey & Whitney, LLP*, 2010 WL 275083, at *4 (S.D. Cal. Jan. 13, 2010) is instructive. Like the ESI Order in this case, the agreement in *Luna* merely "states that the inadvertent disclosure of privileged documents 'shall not constitute a waiver of any privilege,' it does not address under what circumstances failure to object to the use of inadvertently produced privileged documents waives the privilege, which is what the Court must resolve here." *Id.* Applying Rule 502(b), the *Luna* court concluded that the disclosing party waived any privilege over a memo by failing to object to its use at a deposition. Here, a finding of waiver is even more warranted because *Google* discussed the redacted Document in its own filings. Having done so, Google waived any protections regarding the unredacted portions of the Document.

The prior clawback ruling in this case helps Plaintiffs, not Google. *See* Mot. at 7-8 (citing Dkt. 307). That ruling addressed a 31-page document, where Google clawed back limited portions of the document after Plaintiffs had quoted ***different*** portions in a court filing. In Google's own words: "None of the privileged text that Google has now redacted [*i.e.*, sought to claw back] was quoted in the Joint Case Management Statement." Dkt. 290 at 7. Accordingly, there was "no waiver on the facts of this case because the language at issue is not quoted in the case management

filings cited by Plaintiffs." Dkt. 307. Here, by contrast, Plaintiffs quoted from the unredacted portion of the Document that Google now claims to be privileged. Yet rather than immediately claw back the Document, Google filed an opposition brief and a motion to strike, each of which addressed that same unredacted portion of the Document that Google now claims to be privileged. There was no way for Google to overlook the purportedly privileged parts of the Document that Google now belatedly seeks to claw back as privileged, particularly where (1) the entire Document is just five pages, (2) the previously unredacted portion is just about one page, (3) Google had plenty of time to consider the Document and how it would respond to Plaintiffs' then-use of the Document, and (4) Google is now seeking to claw back the entire Document. This Court's prior waiver ruling squarely favors Plaintiffs' position in the current dispute.

Finally, the Court should reject Google's unsupported attempt to evade its waiver based on Google's procedural objections to Plaintiffs' August 8 privilege motion. Mot. at 8-9. Google has already opposed that motion and separately moved to strike portions on procedural grounds. Dkts. 692-93. Whether the Court requires Plaintiffs to re-file their privilege motion (*see* Dkt. 722 at 6 (offering to re-file that motion under a different rule)) has no bearing on the entirely separate issue of whether Google waived privilege. Google cites no case for the proposition that a party's failure to timely object to the use of a purportedly privileged document is excused provided the waiving party has independent objections to the receiving party's filing. The two cases Google cites are incredibly far afield. One concerned a motion to strike an untimely opposition brief filed after the deadline to oppose the operative motion. *See Metzger v. Hussman*, 682 F. Supp. 1109, 1110 (D. Nev. 1988). The other concerned a dispute over compliance with this Court's Local Rules on sealing confidential information. *See Medina v. Argent Mortg. Co.*, 2007 WL 3284064, at *2 (N.D. Cal. Nov. 2, 2007).

To preserve any privilege, Google was required to object to Plaintiffs' reliance on the allegedly privileged portions of the Document in Plaintiffs' August 8 motion. "An objection is timely only if it is raised when the evidence is first presented." *Hologram USA*, 2016 WL 3654285, at *2. Google came nowhere close to objecting when the Document was "first presented." *Id.*

Instead, Google discussed the purportedly privileged portions of the Document in two of its own filings. Any protection as to those portions has been waived.

**B. Google Failed to Timely Object Under Local Civil Rule 7-3.**

Further demonstrating Google's failure to act with diligence, Google's Motion is untimely. After a reply is filed, only two situations permit additional filings: (1) objection to reply evidence; or (2) a relevant judicial opinion published thereafter. Civil L.R. 7-3(d). Any objection to reply evidence must be filed within seven days. Civil L.R. 7-3(d)(1). Plaintiffs filed their reply to their motion for supplemental sanctions on August 25, 2022. Dkt. 708. Any objection to the evidence in support of that reply (including the Document) was due seven days later—on September 1, 2022. *See* Civil L.R. 7-3(d)(1). Google missed that deadline, waited an extra day, and filed this Motion hours before Labor Day Weekend. Plaintiffs' response to Google's clawback request was prompt and detailed; yet Google sat on Plaintiffs' proposal for three days and missed the deadline for objecting. Google improperly seeks an end-run around the Local Rules by disguising its objection to evidence as a motion to strike. The Court should deny Google's Motion, lest Google be rewarded for flouting this Court's clear rules.

**C. Google Should Submit the Entire Document for *In Camera* Review.**

Whether or not the Court concludes that Google waived privilege, Plaintiffs request that Google be ordered to submit the Document for *in camera* review. Google should submit the entire unredacted Document and mark for the Court the portions that were redacted in the version produced to Plaintiffs. Plaintiffs will then revise any filings that refer to portions of the Document that the Court deems privileged. Simply, if the content on which Plaintiffs relied is not privileged, the Court need not engage in further analysis to determine whether there was a waiver.

Plaintiffs' burden in seeking *in camera* review is "relatively minimal." *In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 830 (9th Cir. 1994). To meet this "lenient threshold," *id.*, Plaintiffs need only make a "showing sufficient to support a reasonable, good faith belief that *in camera* inspection may reveal evidence that information in the materials is not privileged," *Newmark Realty Cap., Inc. v. BGC Partners, Inc.*, 2018 WL 2357742, at *1 (N.D. Cal. May 24,

2018) (van Keulen, M.J.) (ordering *in camera* review of documents). And when, as here, the challenged document has been clawed back, the party opposing the privilege assertion "may promptly present the information to the court under seal for a determination of the [privilege] claim." Fed. R. Civ. P. 26(b)(5)(B); *see also U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, 247 F.R.D. 656, 657 (D. Kan. 2007) (conducting *in camera* review of clawed-back document without considering whether the otherwise-applicable standard for *in camera* review was satisfied).

Plaintiffs easily meet this minimal burden. Google reviewed the Document at least five times without seeking to claw it back, which shows that even Google's attorneys reasonably believed that *at least* portions of the Document are not privileged. Google's belated attempt to claim privilege over the *entire* Document (raised in its motion to strike) is also meritless, particularly because none of the emails within the Document were written by attorneys.

1. The Previously Unredacted Portions Are Not Privileged.

As explained above, Google's lawyers correctly concluded at least five times that at least some portion of the Document is not privileged. This alone gives rise to a more than reasonable belief that *in camera* review "may reveal evidence that information in the materials is not privileged." *Newmark Realty Cap., Inc.*, 2018 WL 2357742, at *1. Google's suggestion that its re-reviewers (and perhaps re-re-reviewers) were "unaware of the genesis of the email thread" (Mot. at 2) is highly questionable, particularly since some of the emails in the Document were marked as "privileged" based on a "regulatory investigation." In any event, Google offers no explanation for the four subsequent occasions when its lawyers put eyes on this small Document and concluded that portions are not privileged.

Plaintiffs are not surprised that Google's lawyers concluded that portions of the Document are not privileged. Without discussing the substance of the email, Plaintiffs note for the Court that one unredacted email was from Bert Leung, where he [redacted] by Mr. Leung was not solicited by counsel, nor did Mr. Leung provide that information for purposes of seeking or

facilitating legal advice. "[C]ommunications, consisting as they do of factual information, do not call for a legal opinion or analysis." *In re Micropro Sec. Litig.*, 1988 WL 109973, at *2 (N.D. Cal. Feb. 26, 1988); *see also Jo Ann Howard & Assocs., P.C. v. Cassity*, 2014 WL 6845854, at *1 (E.D. Mo. Dec. 3, 2014) (document "[n]ot privileged because the communication concerned only underlying facts"). "When a communication may relate to both legal and business advice, the proponent of the privilege must make a 'clear showing' that the 'primary purpose' of the communication was securing legal advice." *Dolby Labs. Licensing Corp. v. Adobe Inc.*, 402 F. Supp. 3d 855, 873 (N.D. Cal. 2019). To the extent Mr. Leung's email can even be construed as "relating to" legal advice, Google comes nowhere near a "clear showing" that Mr. Leung's "primary purpose" was to secure legal advice. *Id.*

Google also fails to credibly explain why any "Privileged & Confidential" header was only ***subsequently*** added ***after*** Mr. Leung made the [redacted]. Dkt. 733-3 (Schneider Decl.) ¶ 5 (declaring that he "added a 'Privileged & Confidential' header at the top of several emails that I sent in this chain, including on November 17, 2021, November 22, 2021, November 25, 2021, and December 13, 2021," thus showing the header was ***omitted*** from prior emails in the chain).[3] That omission supports *in camera* review, since even Google's employees sought to designate only subsequent correspondences—and ***not*** the material upon which Plaintiffs relied.

2. The Rest of the Document Is Unlikely to Be Privileged In its Entirety.

Plaintiffs also meet the "lenient threshold" to warrant *in camera* review of the rest of the Document (i.e., the portions that Google redacted in the version produced to Plaintiffs). *In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d at 830. The attorney-client privilege is "narrowly and strictly construed," and the proponent bears the burden of proving that it applies. *Shopify Inc. v. Express Mobile, Inc.*, 2020 WL 4732334, at *2 (N.D. Cal. Aug. 14, 2020). And Google's claimed privilege based on the role of in-house counsel "warrants heightened scrutiny" because "[i]n-house

[3] Mr. Schneider's declaration acknowledges that the Document contains multiple emails within the same thread, but Google refused to provide a privilege log entry for each one. Mao Decl. ¶ 7.

counsel may act as integral players in a company's business decisions or activities, as well as legal matters." *Oracle Am., Inc. v. Google, Inc.*, 2011 WL 3794892, at *4 (N.D. Cal. Aug. 26, 2011).

Google's claim is particularly tenuous here because, as far as Plaintiffs can recall, no Google lawyer sent any of the emails within the thread; each email was sent by a non-lawyer.[4] Indeed, in a case that ***Google now relies on***, the court ordered *in camera* review of an email chain (like this one) "between non-attorneys" and, following that review, ordered production of portions of the emails. *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 2019 WL 1950377, at *5 (N.D. Cal. May 1, 2019). Google points to an inapposite portion of *Planned Parenthood*, where the court considered a communication that included an attorney. *See* Mot. at 4 (quoting portion of the *Planned Parenthood* opinion addressing an "email between Kevin Paul and Savita Ginde," where the court explicitly noted that the withholding party "identif[ied] Paul as an attorney"). Google's other case, *AT&T Corp. v. Microsoft Corp.*, 2003 WL 21212614, at *4 (N.D. Cal. Apr. 18, 2003), is even further afield because that case addressed communications between a company's employees and outside counsel, which is not at issue here.

The far more apt case law comparison is *In re Google Inc.*, 462 F. App'x 975, 978 (Fed. Cir. 2012). In that case, the Federal Circuit rejected Google's privilege assertion over an email between non-lawyers where an in-house lawyer was copied but did not respond. That is exactly the type of communications at issue here in terms of what was redacted. And to the extent any portions of the Document do reflect legal advice, those "potentially privileged pages could have been separated from the nonprivileged pages without indirectly revealing client confidences or removing necessary context from the nonprivileged pages." *United States v. Christensen*, 828 F.3d 763, 804 (9th Cir. 2015). *In camera* review is needed to assess the proper scope of any privilege with respect to the portions Google previously redacted.

3. The Entirety of the Document Is Unlikely to Be Protected Work Product.

Google's work product arguments fare no better. Mot. at 5-6. Google does not specify whether it is asserting fact or opinion work product, but its argument appears focused on fact work

[4] That is of course based on memory. After Google clawed back the document, Plaintiffs asked Google to specify the author of each email within the thread, but Google refused. Mao Decl. ¶ 7.

product. *Compare* Mot. at 6 ("Mr. Schneider conducted an internal investigation to obtain information requested by counsel in anticipation of this regulatory inquiry."), *with Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 507 (S.D. Cal. 2003) ("Fact work product consists of factual material that is prepared in anticipation of litigation or trial."). That distinction is important because "core or opinion work product receives greater protection than ordinary work product." *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663 (3d Cir. 2003).

Plaintiffs already know that at least one portion of the Document (the email from Mr. Leung cited in Plaintiffs' August 8 administrative motion) was expressly ***not*** prepared for purposes of litigation or responding to any investigation. [redacted] Work product does not apply to that email from Mr. Leung, and the same is likely to be true for at least portions of the earlier-in-time emails, which were written by other Google engineers like Mr. Leung.

Google's reliance on *In re Cendant Corp.* is misplaced because that case concerned communications with a "non-testifying trial consultant," a far cry from the circumstances here. 343 F. 3d at 659. *Kintera* is also distinguishable because all of the emails at issue were sent by a single employee, who had been instructed by counsel to send those emails. 219 F.R.D. at 513. Here, the thread included communications from other non-attorney Google employees like Bert Leung.[5] And *Lopes v. Vieira*, 719 F. Supp. 2d 1199, 1202 (E.D. Cal. 2010) supports Plaintiffs' request for *in camera* review, where that court agreed to review certain documents *in camera*. And while the court ultimately upheld the privilege, the facts are inapposite because the documents in *Lopes* were prepared by an outside law firm. *Id.*

Even if work product applied (it does not), Plaintiffs would still be entitled to the Document under the substantial need exception. *See* Fed. R. Civ. P. 26(b)(3)(A)(ii) (work product discoverable when requesting "party shows that it has substantial need for the materials"). As the Court is aware, fact discovery ended long ago, and Plaintiffs already deposed Mr. Leung and Mr.

[5] Plaintiffs don't know how many emails were sent by Mr. Schneider, as opposed to others like Mr. Leung and Mr. Liao, because Google refused to provide that information. Mao Decl. ¶ 7.

Liao, each of whom also testified before this Court. [redacted]. *See* Dkt. 672 at 1.[6] Relatedly, the Court already found that Mr. Liao provided "incomplete" and "misleading" testimony during his deposition. Dkt. 593-3 at 16. [redacted] Dkt. 708 at 1-2; 707-3. The exception to work product applies because "Plaintiffs' attempts to acquire the facts underlying the investigation from other sources have been unsuccessful," particularly given Google's discovery misconduct and its witnesses' obstruction. *Thompson v. C & H Sugar Co., Inc.*, 2014 WL 595911, at *4 (N.D. Cal. Feb. 14, 2014). Since discovery is over, Plaintiffs have no other way to obtain the material within the Document.

Google's blanket assertion of privilege over an entire email thread, where none of the emails were sent by a lawyer, is particularly dubious, and *in camera review* is warranted to test that assertion. Google claims Plaintiffs' privilege challenges "have been baseless" (Mot. at 4), but Google appears to have forgotten that Plaintiffs' challenges resulted in "the significant correction rate of 25% in this case," which "g[a]ve the Court pause," Dkt. 522 at 2, and resulted in additional re-review and productions that yielded a 37% correction rate (Dkt. 566), and culminating in the Court ordering Google to re-review all documents that fell into suspect categories (Dkt. 605). Equally baffling is Google's suggestion that the Court has reviewed 30 documents *in camera* and disagreed with Google on just two of them. Mot. at 4. In fact, the Court has reviewed just 6 documents *in camera*, and agreed with Plaintiffs on two of them. *See* Dkt. 515 (reviewing four documents *in camera* and disagreeing with Google on one of them); Dkt. 541 (reviewing one document *in camera* and ordering production of additional portions); Dkt. 307 (reviewing one document in *camera* and agreeing with Google). Google's final plea for the Court to invoke its

[6] Plaintiffs are intentionally being vague to avoid referring to the substance of the emails at issue.

"inherent authority" also falls flat. Mot. at 9-10. Even the cases Google cites did not grant the motion to strike until ***after*** conducting *in camera* review of the purportedly privileged materials.[7]

4. The Court Should Consider the Crime-Fraud Exception

As the Court conducts its *in camera* review, Plaintiffs ask the Court to keep in mind the crime-fraud exception to privilege. To the extent the Document demonstrates that Martin Sramek and Google's senior litigation counsel for this case [redacted], that would also provide grounds to reject Google's clawback demand and order production.

Given the people involved and the 2021 dates associated with these communications (information that is not privileged), the Document suggests that Google's in-house senior litigation counsel and Mr. Sramek obtained information from [redacted]

[7] *See Politte v. United States*, 2010 WL 11512354, at *15 (N.D. Cal. Mar. 29, 2020) ("From its review of the disputed emails, the Court finds that the back and forth between Ms. Kelly and Ms. Meigs involved a client seeking legal advice from an attorney . . . ."); *Cobell v. Norton*, 213 F.R.D. 69, 73 (D.D.C. 2003) ("After examining the Six Documents, the Court concludes that the four letters and one of the memoranda fall within the scope of the attorney-client privilege.").

[redacted].

The crime-fraud exception may also apply to the extent the Document contradicts representations Google made to the Court in the parties' joint letter brief relating to Plaintiffs' February 8, 2022 motion to compel custodial documents from Bert Leung. Dkt. 399. [redacted] *In camera* review is appropriate to assess these core issues.

As such, the Document may contain evidence of a fraud perpetuated on this Court. The Document may also contain evidence of Google planning to evade or violate its commitments to the United Kingdom's Competition and Markets Authority ("CMA").[8]

[8] [redacted]

### D. Google's Apparent Goal to Delay a Decision on Plaintiffs' Supplemental Sanctions Motion.

Plaintiffs are concerned that Google's Motion to Strike is in part designed to delay a decision on Plaintiffs' pending motion for supplemental discovery sanctions. Dkt. 656. Plaintiffs identified critical deficiencies warranting additional sanctions, Google did not oppose additional briefing (Dkt. 618), and the Court adopted Google's proposed briefing schedule (Dkt. 624). With briefing fully submitted by August 25, 2022 (Dkt. 624), Google now appears set on delaying that process, filing the instant motion to strike and setting a hearing for October 18, while ignoring Plaintiffs' request to simply submit the Document for *in camera* review to resolve this dispute.

Under Civil Local Rule 7-1(b), the Court may exercise its discretion to decide a motion "without oral argument or by telephone conference call." Civil Local Rule 7-1(b) also provides this option "upon request by counsel and with the Judge's approval." This Court has exercised that discretion in the past. *See, e.g.*, *Finjan, Inc. v. Cisco Systems Inc.*, 2020 WL 13180006, *1 (N.D. Cal. June 18, 2020) (van Keulen, M.J.) (deeming matter "suitable for determination without a hearing," citing Civil L.R. 7-1(b)).

Plaintiffs of course defer to the Court on whether there should be a hearing on Google's motion to strike and, if so, whether it should take place on October 18 or sooner. Plaintiffs will make themselves available at the Court's convenience.

## IV. CONCLUSION

Plaintiffs respectfully request that the Court deny Google's motion to strike and, in addition, order Google to submit the entire Document for *in camera* review, including the redacted portions.

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Respectfully submitted,

By: */s/ Mark Mao*

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